SUPREME COURT, U. S.

No. 873

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

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**LILLIAN TENENBAUM, GERTRUDE SCHAFER, PAUL SCHAFER and MARVIN TENENBAUM,**
*Petitioners,*

vs.

**UNITED STATES OF AMERICA,**
*Respondent.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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## PETITION FOR WRIT OF CERTIORARI

Petitioners, Lillian Tenenbaum, Gertrude Schafer, Paul Schafer and Marvin Tenenbaum, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on January 8, 1964, and made final by an order of said Court entered on January 31, 1964, denying a petition for rehearing filed by the said petitioners.

## Opinion of the Court Below

The opinion of the Court of Appeals is as yet unreported, but is printed in Appendix I hereto, *infra*, p. 1.

## Statement of Jurisdiction

The judgment of the Court of Appeals was entered on January 8, 1964. A timely Petition for Rehearing was filed and was denied on January 31, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

## Questions Presented

1. Whether the evidence established that the four defendants entered into and participated in a single conspiracy to defraud certain insurance companies, or whether several separate conspiracies or individual enterprises to defraud the insurance companies were established by the evidence.

2. Whether the trial court's refusal to order a pre-sentence investigation report pursuant to Rule 32 (c) of the Federal Rules of Criminal Procedure and its summary sentencing of the defendants constituted an abuse of discretion, and more particularly, whether Rule 32 (c) of the Federal Rules of Criminal Procedure contains a specific mandate to the trial courts to order and consider pre-sentence investigation reports prior to sentencing.

## Rule Involved

Rule 32.(c), Federal Rules of Criminal Procedure, 18 U.S.C.

* * *

(c) Presentence Investigation

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

* * *

## STATEMENT OF THE CASE.

Count one of the indictment alleged, in substance, that the petitioners, Lillian Tenenbaum, Gertrude Schafer and Paul Schafer devised a scheme to defraud and to obtain money from certain insurance companies. It was alleged that as part of the scheme and artifice the defendants made false representations on their applications that they, or some of them, were employed and earning salaries; that they, or some of them, had not suffered certain illnesses and had not been involved in previous accidents; and that they, or some of them, had not been previously insured for loss of income insurance. It was also alleged that the defendants, or some of them, obtained money from the insurance companies and, that, as part of their scheme, the defendants corresponded with insurance firms and caused insurance companies to correspond with them. The count further charged that on February 21, 1958, Lillian Tenenbaum wrote a letter to Mutual of Omaha for the purpose of executing the scheme to defraud. (App. 4)

Counts two to twelve realleged the basic allegations contained in count one and charged that Lillian Tenenbaum caused to be mailed certain other letters in violation of Section 1341, Title 18, United States Code. (App. 4-10) Counts thirteen to eighteen realleged the basic allegations contained in count one and charged that Gertrude Schafer caused letters to be mailed in violation of the Section. (App. 10-13) Counts nineteen to twenty-six realleged the basic allegations contained in count one and charged that Paul Schafer caused certain letters to be mailed in violation of the Section. (App. 14-18)

Count twenty-seven charged that Lillian Tenenbaum, Gertrude Schafer, Paul Schafer and Marvin Tenenbaum conspired to use the mails in furtherance of a scheme to defraud a certain class of insurance companies by means of false and fraudulent representations. Part of the scheme to defraud was that the defendants, or some of them, would make false representations on applications for loss of income insurance and fraudulent representations on claim forms; part of the scheme to defraud was that the defendants would obtain money from the insurance companies for loss of income through false representations; and part of the scheme to defraud was that the defendants would correspond with insurance firms and would cause insurance companies to correspond with them. The commission of eleven overt acts was charged. (App. 18-21)

Lillian Tenenbaum was found guilty as charged in counts one to twelve and twenty-seven. Gertrude Schafer was found guilty as charged in counts thirteen to eighteen and twenty-seven. Paul Schafer was found guilty as charged in counts nineteen to twenty-seven. Marvin Tenenbaum was found guilty of count twenty-seven. (App. 24)

Lillian Tenenbaum was sentenced to a term of thirty months on all counts to run concurrently. Gertrude Schafer was sentenced to a term of eighteen months on all counts, to run concurrently. Paul Schafer was sentenced to a period of nine months on all counts to run concurrently. Marvin Tenenbaum was sentenced to a term of six months. (App. 24)

In argument to the United States Court of Appeals for the Seventh Circuit, the petitioners questioned, *inter alia*, whether the lower court erred in refusing to acquit them for a failure of proof as to the substantive and conspiracy counts. The argument in regard thereto questioned also

whether the proof showed a single conspiracy or multiple conspiracies. The reviewing court based its decision affirming the convictions on the conspiracy count alone, however, "because the sentences imposed on the substantive counts were to run concurrently with the conspiracy count, * * * and all sentences are within the punishment prescribed for conspiracy against the United States." (Opinion, Appendix I, pp. 1-2)

In 1955, Kenneth Frankel and the petitioner, Marvin Tenenbaum, opened the Fairyland Juvenile Shop in Skokie, Illinois. Marvin Tenenbaum's mother, Lillian Tenenbaum invested $5,000 in the enterprise on behalf of Marvin. Mrs. Tenenbaum did not have any interest in the partnership. She was not a salaried employe. (App. 104) On occasion Lillian Tenenbaum and her sister, Gertrude Schafer, would help out in the store if they were needed. They would not receive any pay for this. Mrs. Tenenbaum worked a dozen or more times in any given year; Mrs. Schafer was there less often. (App. 98) On two occasions Mrs. Tenenbaum went on buying trips to the Merchandise Mart in Chicago. Mrs. Tenenbaum loaned the business between $6,000 and $8,000 during its operation. (App. 99)

Petitioner, Paul Schafer, was employed by the Wallace-Miller Company as a photo-engraver until 1957. In March of that year, while on a vacation in Florida, Paul Schafer injured his back. Because of his failure to return from his vacation on time, the company terminated Schafer's employment as of March 30th. (App. 101) A telegram or letter was sent to Schafer in Florida advising him not to return to work. Defendant's Exhibit 7 a letter from Wallace-Miller, dated April 19, 1957, advised the defendant that it was necessary for the company to replace him because of his absence. (App. 117; 124)

After his employment at Wallace-Miller, Paul Schafer worked for the American Colortype Corporation during September 1957. (App. 102) His total income for 1957 was $4,013.82. (App. 126) In January 1958, Schafer worked for the Globe Engraving Company. (App. 116) In February of that year and again in October of that year, Schafer worked for Hutchings-Melville. (App. 102, 103) He also worked for the Chicago Engraving and Central Typesetting Company in 1958. During that year, he made a total of $3,417.48. (App. 118, 119) In late 1958, and in 1959, he received short jobs through his union which he termed "free lancing or self-employed." (App. 124-125)

In October, 1955, Fred Weiss and his father, insurance brokers for Mutual of Omaha, went to the home of Paul and Gertrude Schafer to sell them disability insurance. Mr. Schafer told them he was a lithographer with an income of approximately $950 per month. (App. 72) In fact, Paul Schafer was working for Wallace-Miller and Company at an annual income of $8,914.13 at this time. (App. 100) Mr. Weiss arranged for Paul Schafer to apply for two policies providing a total of $400 a month income protection. An application to Mutual of Omaha was filled out at that time. On November 8, 1955, Schafer signed an application (Government's Exhibit 42) with United of Omaha, a subsidiary of Mutual of Omaha, for income protection insurance. Subsequently, policies from Mutual of Omaha and United of Omaha, (Government's Exhibits 111 and 112), were issued to Paul Schafer.

According to Mr. Weiss, if a policy holder lost his job and then became ill or met with an accident the policies would provide indemnity payments. There was nothing in the company's policy insofar as the loss of employment was concerned. (App. 73)

In September, 1956, George Anton Vrame, an agent for the Mutual of Omaha Insurance Company, visited Gertrude and Paul Schafer at their home in regard to an income protection policy for Mrs. Schafer. Later that month, Vrame again called upon the Schafers and went over the provisions of the proposed policy. Mrs. Schafer asked her husband if she should take out the policy and, after some "debate", he said, "Well, if you feel its a good thing for you, I think you ought to have it." (App. 53) Vrame then filled out an application, (Govt. Exh. 40) for Mrs. Schafer. She told him that she worked for the Fairyland Juvenile Store in Skokie, Illinois, and that she had an income of $300 a month from this employment. (App. 53) A policy, (Gov't Exh. 109), was issued to Mrs. Schafer pursuant to the application. (App. 54)

Mrs. Schafer then recommended that Vrame contact her sister, Lillian Tenenbaum, and explain an income protection policy to her. She called her sister and Vrame introduced himself to her over the telephone. He met Lillian Tenenbaum in October, 1956. At that time, Mrs. Tenenbaum had a policy with the Metropolitan Insurance Company which provided $400 a month income protection, but which was cancellable. Vrame offered her a better policy. She was told that she had to be sick or unable to work in order to collect its benefits. (App. 54) Mrs. Tenenbaum said she was the manager and buyer-owner of the Fairyland Juvenile Store. Vrame did not recall whether she said she owned it exclusively or with someone else. Mrs. Tenenbaum applied for two policies from Vrame and in answer to a question on both applications, (Government's Exhibits 38 and 38A), as to her occupation, said, "Owner manager infants' wear store." Mrs. Tenenbaum said she

made about $900 a month income. She said she had never been sick or hospitalized nor had she had an accident. Two policies were issued pursuant to the application. (App. 55, 56)

On October 15, 1956, William A. Beyer, a claim's adjuster for Mutual of Omaha, investigating applications for new insurance, interviewed Marvin Tenenbaum at the Fairyland Juvenile Store in Skokie. Beyer asked to speak to Lillian Tenenbaum and was told that she was not there. Marvin Tenenbaum said he was her son and offered to supply any necessary information. Marvin said that Mrs. Tenenbaum was employed at the store and worked as a partner in the business with him. He told Beyer that Mrs. Tenenbaum served as a saleslady approximately 85% of the time and that she spent the balance of her time as a buyer of merchandise. He said that she had a salary plus other remunerations from the business, but he could not give a specific figure. (App. 80, 81)

In December, 1956, Albert Mindel, an employe of Mutual of Omaha, called on Paul and Gertrude Schafer at their home in response to an inquiry by Mr. Schafer concerning his Mutual of Omaha and United of Omaha policies. Mindel arranged to convert Schafer's policy with United of Omaha to Mutual and to change the terms of the existing Mutual policy. (App. 67) The new policy was to be noncancellable and provide for $100 a month increased coverage. Mindel had explained that an insured had to be earning twice the coverage per month before the company would write standard risk policies above $300 a month. Schafer assured him that his income was $1,000 a month. In response to questions in the application, changing the terms of the existing Mutual policy, (Government's Exhibit 43B), Schafer stated that he had a shoulder separation as a result of a bathtub fall in February, 1955,

that he had been disabled for two months, and that he had had full recovery (App. 69). In the application for the additional policy, (Government's Exhibit 43A), Schafer stated that he was a photo-engraver employed by Wallace-Miller and Company and that his average monthly earnings was $1,000 (App 69). In fact, Schafer was employed by Wallace-Miller, and during the year 1956 he received $8,437.05 from them. (App. 100)

Mindel stated that if a man were insured and employed and if he then lost his job and was not earning a salary, the policy would provide payment of the indemnity, although the policy does not so state (App. 71)

Burton Simons, an insurance broker for the Continental Casualty Company, met Lillian Tenenbaum in October, 1958, and discussed with her an income protection policy. Mrs. Tenenbaum told him she was employed at the Fairyland Juvenile Shop in Skokie and that she had an approximate monthly income of $525. Mrs. Tenenbaum gave Simons the answers in an application, (Government's Exhibit 3), and then signed it. (App. 47) A policy, (Government's Exhibit 107), was issued pursuant to that application. (App. 30) The Continental Casualty Company required that an applicant be earning at least 25% in excess of the indemnity in order to qualify for the policy. (App. 31)

In October, 1959, an investigator for the Retail Credit Company, Harold Lindeen, interviewed Marvin Tenenbaum at the Fairyland Juvenile Store relative to Lillian Tenenbaum's employment there. He was told on three occasions by Marvin that Lillian was employed there but that she was not in the store at that time. On a fourth occasion, Lindeen saw and spoke to Mrs. Tenenbaum at the store in relation to an accident claim which she had filed

against the Continental Casualty Company. She related the details of the accident and said that she was disabled for a period of time after the accident. She said she was employed in the store as a buyer. (App. 78-80)

On January 25, 1959, Cyrus Marden, an agent for the John Hancock Insurance Company, called on Gertrude Schafer at her home and explained an income protection insurance policy about which she had previously inquired. Mrs. Schafer said she worked for M. J. Grundland Co., as a buyer and that she made over $700 a month. Marden returned the next day and Mrs. Schafer asked her husband if she should sign the application for insurance and he said he felt she should take it. Marden then filled out an application (Government's Exhibit 13), for Mrs. Schafer. She repeated that she worked for Grundland as a buyer and as a saleswoman and that she made approximately $700 per month. (App. 39-40) A policy, (Government's Exhibit 110), was issued pursuant to the application. (App. 27)

Maurice Grundland, the owner of Grundland's Jewelry Store, had known the defendants for many years. He said that Gertrude Schafer never worked for him. In April, 1959, Mrs. Schafer came into the store and said she was making $700 a month working for him. Grundland said, "You know this is not the truth. I don't make myself this kind of money." She said, "What you care? You can sign. The insurance company with the lawyer always take care, you don't need to be afraid." On September 21, 1961, she called him and said, "You know Maurice, I might go to jail. You better say I worked for you." (App. 83)

On cross examination, he first testified that he never wrote a letter to the effect that Mrs. Schafer worked for him (App. 87). Then he testified that Mrs. Schafer forced him to sign a letter (App. 87). He denied that he

wrote a letter, Deft. Exh. 4, that Gertrude Schafer was employed as a buyer and seller since February 7, 1958 (App. 88). He then testified that a lawyer named Hutul forced him to write it (App. 93). He further testified that the lawyer told him to write it because "when this comes to court the court must see you wrote this with your own hand." He testified at another point that he did not protest to Hutul that Mrs. Schafer did not work for him (App. 93). He admitted that he signed another letter (Deft. Exh. 5). He did not remember whether they were both signed on the same day (App. 95).

Leon Palles and Maurice Palles negotiated with Lillian Tenenbaum in late 1959 and early 1960 regarding a Prudential income insurance policy. An application (Government's Exhibit 10) for such policy was filled out on April 8, 1960. (App. 63) In that application, Mrs. Tenenbaum said that she was a partner and buyer in a retail juvenile wear shop and that she earned between $700 and $750 per month. (App. 64) Pursuant to that application a policy, (Government's Exhibit 108), was issued. The company required that a person be employed as a condition of the policy. (App. 28)

In February, 1960, Howard Ullrich, conducting an investigation for the Prudential Insurance Company, interviewed Marvin Tenenbaum at the Fairyland Juvenile Shop in Skokie regarding Mrs. Tenenbaum. Marvin told Ullrich that his mother was a buyer for the shop and a retail clerk. He said his mother made from $10,000 to $14,000 a year from the business. (App. 81-82)

Evidence was also presented that in 1958, in connection with a claim for injuries against the Chicago Transit Authority, which was not part of the scheme alleged in the indictment, Marvin Tenenbaum directed an investigator for the Transit Authority, who made inquiries concerning

Lillian Tenenbaum and Gertrude Schafer, to Gertrude Schafer who was behind the counter at the Fairyland Juvenile Store. Gertrude told the investigator that she was employed in the store and earning about $300 per month. She said that Mrs. Tenenbaum was an owner and buyer for the store and earned about $125 per week. (App. 126-127)

In August of 1957, another investigator for the Chicago Transit Authority, also investigating an accident claim which was not part of the subject-matter of this indictment, was told by Marvin Tenenbaum that his mother and Gertrude Schafer were employed by the Fairyland Juvenile Store. (App. 130)

In addition to the foregoing testimony, the Government also introduced testimony of other isolated false statements by Lillian Tenenbaum and a number of documents, consisting of applications for insurance, insurance policies, claims for indemnity and reports of accidents and settlement checks. The bulk of these exhibits pertained to alleged fraudulent statements made by the particular defendant with which each document was concerned; as such the documents related to the substantive counts, or possibly to an overt act charged in the conspiracy and alleged to have been committed by one defendant only. The efficacy of these documents to support the convictions on the substantive counts was challenged in the Court of Appeals, but no decision was rendered on this challenge, as noted above. Five documents pertained to more than one defendant.

Government's Exhibit 1 was a report of disability due to an accident executed by Lillian Tenenbaum on Febru-

ary 21, 1958, and mailed to Mutual of Omaha. In that document, Lillian Tenenbaum stated that she was part owner and buyer of the Fairyland Juvenile Store and that her monthly salary was $900. Marvin Tenenbaum signed an employer's statement contained in the exhibit to the effect that Mrs. Tenenbaum had left work on December 5, 1957, and that she had not returned to work at the date of the document's execution.

Government's Exhibit 52 was a report of accident executed by Lillian Tenenbaum in February, 1957, and mailed to Mutual of Omaha. The report contained a physician's report and an employer's statement, executed by Marvin Tenenbaum, that Lillian Tenenbaum left work on November 6, 1956, and returned to work on February 13, 1957.

Government's Exhibit 53 was a report of disability due to sickness executed by Lillian Tenenbaum on November 6, 1957, and mailed to Mutual of Omaha. Mrs. Tenenbaum stated, in that report, that she was the buyer and manager of an infant's apparel store and that her monthly salary was $900. In an employer's statement contained in the exhibit, Marvin Tenenbaum stated that Mrs. Tenenbaum left work on September 14, 1957, and returned on October 15, 1957.

Government Exhibit 62 was a claim of accident executed by Gertrude Schafer and mailed to United of Omaha. In this document, Mrs. Schafer stated that she was a saleslady earning $300 a month. Marvin Tenenbaum executed an employer's statement in this claim on January 5, 1957, stating that Mrs. Schafer had not returned to work since November 5, 1956.

Government's Exhibit 63 was a further report on the same accident statement in which Marvin Tenenbaum, on January 19, 1957, stated that Mrs. Schafer left work on November 5, 1956, and would resume her duties on February, 1, 1957.

**Basis for Federal Jurisdiction**

This case was instituted in the District Court by indictment by the Grand Jury of the Northern District of Illinois, Eastern Division, for violations of 18 U.S.C., Sections 1341 and 371.

## REASONS FOR GRANTING WRIT

1. Lacking any substantial basis from which to reason that a single conspiracy was involved or proved in this cause it is difficult to formulate a more precise sounding reason for granting the Writ than simply to say that the lower courts have failed to follow the two leading decisions of this Court on conspiracy: *Kotteakos* v. *United States*, 328 U.S. 750, and *Blumenthal* v. *United States*, 332 U.S. 539. Accordingly, the writ is requested by virtue of this Court's supervisory power over the lower federal courts. It is the Petitioners' theory that the lower courts have misapplied or have failed to apply the rules promulgated in the *Kotteakos* and *Blumenthal* decisions, and that their failure to apply these rules correctly has deprived all of the Petitioners of basic rights.

At first glance it would appear that the relationships of the parties involved might admit of a single enterprise. Paul and Gertrude Schafer are husband and wife; Lillian and Marvin Tenenbaum are mother and son; Lillian Tenenbaum and Gertrude Schafer are sisters. At this point, however, all resemblance between the acts of the petitioners and a single conspiracy vanish. The evidence shows three separate conspiracies or two conspiracies and several individual enterprises. Perhaps the easiest identifiable conspiracy was that between mother and son, Lillian and Marvin Tenenbaum. Considering the evidence in a light most favorable to the government, Lillian Tenenbaum made false statements and Marvin Tenenbaum supported her false statements with his own. These statements enabled Mrs. Tenenbaum to qualify for income protection insurance policies, and perhaps to collect on the indemnity provided by them. For the purpose of argument here we can assume that this evidence established

a conspiracy between Marvin Tenenbaum and Lillian Tenenbaum. The attempt to join Gertrude Schafer to this conspiracy, however, is not only reminiscent of *Kotteakos* but is illogical. The Court of Appeals joined Mrs. Schafer because a), Marvin Tenenbaum made false representations on her behalf; b), she referred one insurance agent to Mrs. Tenenbaum; and c), the course of her conduct was similar to that of Mrs. Tenenbaum.

Again, we assume *arguendo* that Mrs. Schafer made false statements, that Marvin Tenenbaum supported these statements with his own false statements, and that they entered into conspiratorial agreements. This action does not, however, join Mrs. Schafer to the assumed conspiracy between Marvin and Lillian Tenenbaum. Whatever Marvin Tenenbaum said or did on behalf of Mrs. Schafer did not further or affect the situation between himself and his mother. At this juncture it is difficult to distinguish the alleged conspiracy from that in *Kotteakos* v. *United States*, 328 U.S. 750, Marvin Tenenbaum occupying the status of the "hub" [Brown], and Mrs. Schafer and Mrs. Tenenbaum occupying the positions of the "spokes," [Kotteakos and Lekacos].

> "But that was not enough to make them [Lekacos, Kotteakos and other applicants] confederates with the other applicants; it did not give them any interest in the success of any loans but their own; there was no interest, no venture, common to them and anyone else but Brown himself. * * *" *United States* v. *Lekacos*, (2nd Cir. 1945), 151 F.2d 170, 173, reversed *sub nom*. *Kotteakos* v. *United States*, 328 U.S. 750.

Adopting the well-known cliche, no rim joined the spokes each to the other. To supply this glaring deficiency the lower courts considered the fact that Mrs. Schafer introduced Mr. Vrame, (the agent for the Mutual of Omaha Insurance Company), to Mrs. Tenenbaum. (App. 54) The

lower court might as well have noted that Mrs. Schafer, on another occasion, accompanied Mrs. Tenenbaum when she called at the insurance agency of Leon Palles. (App. 58) On neither occasion did Mrs. Schafer make any statement regarding Mrs. Tenebaum's insurable status or otherwise lend any support to whatever schemes the latter might have formed. In all significant respects these introductions are no different from Lekacos' introduction of Kotteakos to Brown, discussed in *United States* v. *Lekacos*, (2nd Cir. 1945), 151 F.2d 170, 172. Nor does the fact that Mrs. Schafer's practices were similar in form to those of Mrs. Tenenbaum join her in a conspiracy with Mrs. Tenenbaum. Similarity of conduct, even identity of conduct, does not logically presuppose concert of action and an agreement to achieve a distinct illegal end. *Canella* v. *United States*, (9th Cir. 1946), 157 F.2d 470. Mrs. Schafer and Mrs. Tenenbaum did not have any interest in the success of any applications or claims of the other; there was no interest, no venture, common to them. See, *United States* v. *Lekacos*, (2nd Cir. 1945), 151 F.2d 170, 173, reversed *sub nom. Kotteakos* v. *United States*, 328 U.S. 750.

The joinder of Paul Schafer to the agreement presupposed to have existed among Gertrude Schafer, Lillian Tenenbaum and Marvin Tenenbaum compounded the error. Paul Schafer had no dealings with either Lillian or Marvin Tenenbaum. He made no representations involving them and they made none involving him. The lower courts tied him to the Tenenbaum group because "He was *present* when Gertrude referred an agent to her sister, Lillian." (Opinion, Appendix I, p. 2; Emphasis added.) Later the court concluded that Paul "aided" in referring an agent to Lillian, but that finding is wholly without support in the record. Even if it were, however, the introduction cannot

involve Paul in a conspiracy with Lillian Tenenbaum and Marvin, for it does not indicate the existence of any agreement.

Recognizing this, the lower courts attempted to connect Paul Schafer to the conspiracy by joining him to Gertrude Schafer's activities. Thus the Court of Appeals recited:

> "Paul Schafer applied for income protection insurance and filed fraudulent claims. He was with Gertrude on both occasions when she discussed applications with insurance agents and when, on one occasion, she sought his advice, he told her to take it if it's a good thing for her. On these occasions he knew the discussion was about income protection insurance and heard her tell the agents the falsehoods about her salary. * * * He knew she was not employed at either Fairyland or Grundland's. He was with Gertrude when she asked Grundland to verify, falsely, the statement in an application for insurance that she worked for him." (Opinion, Appendix I, p. 2)

This recitation led the court to the conclusion that:

> "The jury could reasonably conclude from the evidence that each of the defendants knew what was being done by the others in the carrying out of a scheme in which Paul Schafer *aided* Gertrude in falsifying application, referring an agent to Lillian, and trying to induce Grundland to cover up for Gertrude; * * *" (Opinion, Appendix I, p. 3. Emphasis added.)

It was suggested to that court in the Petition for Rehearing and it is again emphasized here that any conclusion that Paul gave aid to anyone is without support in the record. Presence at an event is not tantamount to giving aid. See, *United States* v. *Aviles*, (2nd Cir. 1960), 274 F. 2d 179. The assertion that Paul Schafer filed any fraudulent claims was also vigorously disputed in the court below, both before and after the opinion of the Court of Appeals. Insofar as the issue on the substantive counts was not decided by the Court of Appeals, the question

of Paul Schafer's guilt on those counts cannot be and is not here raised. Nevertheless, Paul Schafer stands ready, willing and able to dispute the conclusion that he at any time filed any fraudulent claims.

But even if the events which the Court of Appeals has characterized above constitute a conspiracy with anyone, they show a separate conspiracy between Paul and Gertrude Schafer, not one involving the Tenenbaums. Paul Schafer, of course, denies that the facts set out by the Court of Appeals show that he conspired with Gertrude. A criminal conspiracy consists of an agreement between two or more persons to do an unlawful thing. *Pinkerton* v. *United States*, (5th Cir. 1945), 151 F.2d 499, affirmed, 328 U.S. 640. The gist of the crime is the agreement. *Braverman* v. *United States*, 317 U.S. 49. Nevertheless, parties to the conspiracy must have, as the objective of their agreement, a single unlawful end or result. *Blumenthal* v. *United States*, 332 U.S. 539, 558. The record does not reflect that the minds of the parties reached a common understanding to jointly accomplish any single illegal object. Indeed, even as between Paul and Gertrude Schafer, the record merely reflects "several, though similar purposes of numerous separate adventures of like character." *Kotteakos* v. *United States*, 328 U.S. 750, 769; *Canella* v. *United States*, (9th Cir. 1946) 157 F.2d 470, 476. This does not amount to a conspiracy.

In *Blumenthal* v. *United States*, 332 U.S. 539, this Court distinguished between "single conspiracies" and "multiple conspiracies." The test applied in the *Blumenthal* case is particularly applicable here. Speaking of *Kotteakos* v. *United States*, 328 U.S. 750, the Court said:

> "Apart from the much larger number of agreements there involved, no two of those agreements were tied together as stages in the formation of a larger all-

> inclusive combination, all directed to achieving a single unlawful end or result. On the contrary each separate agreement had its own distinct, illegal end. Each loan was an end in itself, separate from all others, although all were alike in having similar illegal objects. Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. And none aided in any way, by agreement or otherwise, in procuring another's loan. The conspiracies therefore were distinct and disconnected, not parts of a larger general scheme, both in the phase of agreement with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single, over-all, comprehensive plan." *Blumenthal* v. *United States*, 332 U.S. 539, 558.

Comparison of this language with the facts in the present case demonstrates that plural conspiracies were involved in the present case. Each separate agreement had its own distinct illegal end. Each insurance policy, each claim filed, was of concern only to the defendant applying for the policy or making the claim. See, *Rocha* v. *United States*, (9th Cir. 1961), 288 F.2d 545.

*Kotteakos* v. *United States*, 328 U.S. 750, decided that the variance arising from the joinder of several distinct conspiracies for trial as a single conspiracy affected the substantial rights of the defendants. Admittedly, *Kotteakos* was decided without overruling *Berger* v. *United States*, 295 U.S. 78, which involved four defendants and two conspiracies charged as one. The Court, in refusing to overrule *Berger*, said:

> "The line must be drawn somewhere. Whether or not Berger marks the limit, for this sort of error and case, we are clear that it must lie somewhere between that case and this one." 328 U.S. 750, 774.

In terms of numbers, this case lies between *Berger* and *Kotteakos*. In terms of the impact upon the prevailing practice regarding joinder and "harmless error" this case is aligned with *Kotteakos*. Paul Schafer and Marvin Tenenbaum, by virtue of their "joinder" with Lillian Tenenbaum and Gertrude Schafer have been overwhelmed. And, of course, the individual cases of Lillian Tenenbaum and Gertrude Schafer have been magnified that much more by virtue of their alliance with Paul Schafer and Marvin Tenenbaum. The impressive number of documents, (some 112 for the government in all), and the sheer weight of numbers as to the insurance companies allegedly defrauded all worked unfairly to the defendants' disadvantage. Certorari should be granted to mark the limit between *Berger* and *Kotteakos* and to implement the *Kotteakos* and *Blumenthal* decisions for the benefit of the lower federal courts.

2. At the conclusion of the case, immediately following the jury's verdict of guilty, the trial court denied an application for a pre-sentence investigation report pursuant to Rule 32 (c) of the Federal Rules of Criminal Procedure, 18 U.S.C., and sentenced the defendants. The colloquy among trial court, counsel for the defendants and certain of the defendants, (App. 136-140; Government's Additional App. 9-23) illustrates the fundamental argument of the Petitioners: that except in the most unusual circumstances it is error for the trial court to pronounce sentence without ordering and using a pre-sentence report. The Court should grant a certiorari as an adjunct of its supervisory power over the lower federal courts to decide this issue.

The Court has already decided that Rule 32 (a) of the Federal Rules of Criminal Procedure, 18 U.S.C., contains a mandatory direction to the trial court to afford a defendant his right of allocution prior to sentencing. See,

*Green* v. *United States*, 365 U.S. 301, 304. In essence, Rule 32 (c) affords a convicted defendant the same opportunity to present otherwise non-admissible evidence in mitigation as does Rule 32 (a). The trial court assumed that the defendants were free of any criminal records. Since, in the court's opinion, the main purpose of a pre-sentence report is to disclose a prior criminal record, he saw no reason for ordering one. (App. 136) The Court of Appeals opined that the post trial colloquy showed that the trial court felt that a report was unnecessary because of the testimony at the trial about the defendants and the facts of the case itself which showed violations over a seven year period. But Rule 32 (c), like Rule 32 (a) was obviously intended to overcome the shortcomings of the trial judge's considering only the evidence adduced at trial before sentencing.

The Court of Appeals for the Seventh Circuit has held that Rule 32 (c) contains a direction only to the Probation Service of the Federal Court and that it is not mandatory upon the trial judge to order the report if he does not deem it advisable. *United States* v. *Karavias*, (7th Cir. 1948), 170 F.2d 968. The other Circuits have held similarly. See, *Leach* v. *United States*, (D.C. Cir. 1963), 320 F.2d 670, 672; *Roddy* v. *United States*, (10th Cir. 1961), 296 F.2d 9; *United States* v. *Williams*, (3rd Cir. 1958), 254 F.2d 253, 254; *United States* v. *Schwenke*, (2nd Cir. 1955), 221 F.2d 356. On the other hand, an eminent Federal District Judge has written:

> "Pre-sentence reports containing more information pertinent to the individual offender are becoming more widely recognized as indispensable to a just sentence.
>
> "Never, in determining hundreds of sentences, have I even tentatively concluded what one should be before securing and carefully studying a pre-sentence report, or without personally conferring with the probation

> officer who prepared the report. I cannot imagine how any judge would decline to use the light and aid of a pre-sentence report if it were available to him. * * * [N]o man should undertake to judge the culpability of a fellowman, and to fix the character and extent of his punishment, without having the benefit of every bit of relevant information it is practical to obtain. Every judge of my acquaintance feels that way. * * * Some time, not too distant I hope, it may be reversible error to impose a criminal sentence without ordering and using a presentence report." Boldt, "Recent Trends in Criminal Sentencing", American Criminal Law Quarterly, Vol. 1, No. 4, p. 4 6 (1963).

To conclude, as did the lower courts here, that all information relevant to the question of sentencing can be adduced from the evidence heard at the trial is to ignore the patent distinction between a trial on the issue of guilt or innocence and a post trial proceeding in aggravation or mitigation. Here the trial judge had only the information concerning the alleged crimes committed by the defendants. Mail fraud cases, almost by definition, show a period of transgressions lasting several years. That in itself, however, does not remove such a case from the operation of the rule.

The trial court also stated impatiently that if he did not sentence the defendants immediately they would obtain more insurance. (App. 137) Comments such as these prompted counsel to plead with the trial court to obtain a report and delay sentencing until his ire at the defendants had cooled. (Government's App. 17, 19, 21.) No injury would have been done nor would anyone have been prejudiced had the trial court waited until a pre-sentence report had been made and considered before sentencing. Failure to wait deprived the judge of the ex-

pert services of the Probation Service of the Federal Courts. Without these services, the sentencing judge has little or no information on the social, economic and educational backgrounds of the defendants; he is wholly unable to formulate a prospectus for rehabilitation, especially in a case where none of the defendants have criminal records. Then too, the sentencing judge, without the services of the report, is unable to gauge the impact of sentencing on the defendants and those dependent on them. In the last analysis, the administration of justice more than the individual defendants suffer by the failure to order and consider the report. And, while the words of the rule may permit a small degree of discretion in the trial judge as to whether or not a report should be received, the circumstances of this case, and most cases, require the utilization of the report. This Court's supervisory authority is the proper vehicle for insuring the use of the report and the exercise of proper discretion by the trial courts.

## Conclusion

For the above and foregoing reasons it is prayed that a writ of certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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## APPENDIX I

### Opinion of the United States Court of Appeals for the Seventh Circuit, United States vs. Tenenbaum, et al, Case Number 14117

Before HASTINGS, *Chief Judge*, KILEY and SWYGERT, *Circuit Judges*.

KILEY, *Circuit Judge*. Lillian Tenenbaum, Gertrude Schafer, her sister, Paul Schafer, Gertrude's husband, and Marvin Tenenbaum, Lillian's son, have appealed from judgments on verdicts against them in a trial under an indictment charging use of the mails to defraud insurance companies.[1]

The substance of the charges is the use of the mails in a scheme to defraud insurance companies of income protection insurance benefits by means of false and fraudulent representations. All defendants were found guilty of conspiracy, and all but Marvin were convicted separately on several substantive counts.

The issues are whether the district court erred in refusing to acquit defendants for failure of any proof of a scheme or conspiracy to defraud; whether reversible error was committed in admitting testimony against Lillian Tenenbaum and in jury argument of government counsel; and whether the court abused its discretion in denying defendants' motion for a pre-sentence investigation. We think each issue must be decided against defendants.

We base our decision upon the conspiracy count alone, because the sentences imposed on the substantive counts were to run concurrently with the conspiracy count. *Hira-*

[1] The substantive offenses were in violation of 18 U. S. C. § 1341, and the conspiracy in violation of 18 U. S. C. § 371.

*hayashi* v. *United States*, 320 U. S. 81, 85 (1943); *United States* v. *Doran*, 299 F. 2d 511, 514 (7th Cir. 1962), *cert. denied*, 370 U. S. 925, and all sentences are within the punishment prescribed for conspiracy against the United States.[2]

We have taken the evidence most favorable to the government in treating the contention that defendants should have been acquitted on their motions. *United States* v. *Glasser*, 315 U. S. 60, 80 (1942).

Lillian Tenenbaum applied for several income protection insurance policies with various companies, stating falsely that she was employed by the Fairyland Juvenile Store in Skokie, Illinois. Gertrude Schafer also applied for similar policies, stating falsely that she was employed at the Fairyland store, and at Maurice Grundland's jewelry store.

Paul Schafer applied for income protection insurance and filed fraudulent claims. He was with Gertrude on both occasions when she discussed applications with insurance agents and when, on one occasion, she sought his advice, he told her to take it if "it's a good thing for" her. On these occasions he knew the discussion was about income protection insurance and heard her tell the agents the falsehoods about her salary. He was present when Gertrude referred an agent to her sister, Lillian. He knew she was not employed at either Fairyland or Grundland's. He was with Gertrude when she asked Grundland to verify falsely the statement in an application for insurance that she worked for him.

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[2] If a person is found guilty of a conspiracy against the United States, he can "be fined not more than $10,000 or imprisoned not more than five years, or both." 18 U. S. C. § 371.

Marvin told, falsely, several insurance investigators that his mother worked for him as a buyer and clerk. He made false statements on an application implying that Gertrude Schafer worked for him. He falsely "signed an application" that he was his mother's employer.

We think this was sufficient evidence to support the indictment that defendants conspired, in a single conspiracy, to devise a scheme to defraud insurance companies by means of false and fraudulent representations. *Nilva v. United States*, 212 F. 2d 115, 121 (8th Cir. 1954), *cert. denied*, 348 U. S. 825. The jury could reasonably conclude from that evidence that each one of the defendants knew what was being done by the others in the carrying out of a scheme in which Paul Schafer aided Gertrude in falsifying application, referring an agent to Lillian, and trying to induce Grundland to cover up for Gertrude; and that Marvin participated by backing up the falsehoods told by Lillian and Gertrude.

There was no need to prove intent of defendants to use the mails in order to complete the proof of the offense charged against defendants. *Blue v. United States*, 138 F. 2d 351, 359 (6th Cir. 1943), *cert. denied*, 322 U. S. 736 (1944). It was enough to show that the mails were actually used, *Ibid.*, as they were here in mailing applications and policies, inquiring about benefits, and making claims.

There is no merit in the contention Lillian Tenenbaum was prejudiced by the admission of testimony of Johnson, of Allstate Insurance Company, that she had applied to Allstate for income maintenance insurance, but that it did not issue a policy to her. The testimony was relevant to supplement testimony of her application to Allstate, one of the "Overt Acts" charged, and her statement to Allstate's agent that she made $400 per month from the Fairyland store.

Defendants claim prejudicial argument on the part of government counsel. The trial lasted nine days and was vigorously contested. We have read the arguments of attorneys for both sides on these claims and the trial court's comments when overruling objections to the argument, and we cannot say defendants' substantial rights were affected in the argument. Fed. R. Civ. P. 52(a).

The decision of Judge Swygert in *United States* v. *Karavias*, 170 F. 2d 968 (7th Cir. 1948), does not compel a finding here that the district court abused its discretion in denying defendants' motion for a pre-sentence investigation. The district court in a lengthy post-trial colloquy with defendants and their attorney indicated that the testimony in the nine day trial, about defendants and showing the violations, charged in the indictment, extending over seven years, was the reason why he thought a pre-sentence report was unnecessary. The court stated that the range of sentences contemplated the various degrees of guilt.[3] This does not show an abuse of discretion.

Judgments Affirmed.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit.*

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[3] Lillian Tenenbaum was senteneed to thirty months imprisonment; Gertrude Schafer, eighteen months; Paul Schafer, nine months; and Marvin Tenenbaum, six months.

## APPENDIX II

**Judgment Order of the United States Court of Appeals For the Seventh Circuit entered January 8, 1964, in the case of United States v. Tenenbaum, et al, Number 14117.**

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.